Filed 3/15/19 H.D. v. Super. Ct. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

H.D., Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Real Party in Interest.	B294397 (Super. Ct. No. CK90702D)

ORIGINAL PROCEEDING; petition for extraordinary writ. Emma Castro, Juvenile Court Referee. Dismissed.

Los Angeles Dependency Lawyers, Law Office of Katherine Anderson, Shannon Humphrey, Samuel Robles, for Petitioner.

No appearance for Respondent.

Office of the County Counsel, Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, Tracey F. Dodds, Principal Deputy County Counsel, for Real Party in Interest.

H.D. (mother) filed this petition for extraordinary writ after the juvenile court terminated reunification services and set the matter for a selection and implementation hearing concerning mother's infant daughter, A.D. We consider whether prior orders made by the juvenile court in the dependency case must be vacated because the Los Angeles County Department of Children and Family Services (DCFS) did not comply with inquiry and notice requirements under the Indian Child Welfare Act (ICWA) and related provisions of California law.

I. BACKGROUND

Mother has three older children with whom she failed to reunify. For that reason, DCFS was notified when she gave birth to A.D. in January 2017. DCFS thereafter filed a petition alleging A.D. was at substantial risk of suffering serious physical harm because A.D.'s father abused alcohol and marijuana and because mother had a history of mental and emotional problems.

At the initial detention hearing, mother reported on an ICWA-020 form that she "may have Indian ancestry." A notation next to "Name of tribe(s)" on the form that mother submitted states: "Cherokee Nation – Mgtgmo [presumably short for maternal great grandmother] Dorothy Mae McClendon 12-11-27." The juvenile court ordered DCFS to investigate mother's claim of Indian ancestry and to provide notice to the appropriate tribe, the Bureau of Indian Affairs, and the Secretary of the Interior.

In a jurisdiction/disposition report prepared by DCFS, the agency reported a case worker had asked mother for additional information regarding her Indian ancestry and mother said she did not have any registration papers and did not know whom to contact for additional information. The case worker also

reportedly tried, on a single day thereafter, to reach the maternal grandmother and maternal uncle without success.

A.D.'s possible Indian ancestry was not mentioned again until roughly 20 months later, in connection with the final contested review hearing when counsel for DCFS reminded the juvenile court that it had not yet made ICWA findings. According to counsel for DCFS, the maternal uncle (who was present at the initial detention hearing) said the Native American history was "family lore only." After reviewing mother's ICWA-020 form, the court ordered DCFS to notify the Cherokee Nation, the Department of Interior, and the Bureau of Indian Affairs of mother's assertion that A.D. may have Cherokee heritage. It also ordered DCFS to contact maternal grandmother and maternal uncle again, and to determine whether the maternal great grandmother, Dorothy Mae McClendon, was still living—and if so, to obtain a current telephone number for her.

Notwithstanding its order for further ICWA inquiry and notice, the juvenile court proceeded to terminate mother's reunification services and set the matter for a selection and implementation hearing pursuant to Welfare and Institutions Code section 366.26. The court also set a nonappearance progress report date for DCFS to provide an update regarding its ICWA compliance.

II. DISCUSSION

Mother argues we should reverse the orders made by the juvenile court to date and remand with directions to vacate the upcoming selection and implementation hearing pending DCFS's compliance with its ICWA-related obligations. We do not believe reversal of prior orders is required, and because the juvenile

court has already ordered DCFS to do what we would otherwise direct to be done on remand, we can provide no effective relief to mother. We will therefore dismiss the petition giving rise to this proceeding as moot.

The Indian Child Welfare Act (ICWA), codified at Title 25, United States Code, section 1901 et seq., "protect[s] the best interests of Indian children and . . . promote[s] the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . . ." (25 U.S.C. § 1902.) "'Indian child' means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe . . . ." (25 U.S.C. § 1903(4).)

"When a court 'knows or has reason to know that an Indian child is involved' in a juvenile dependency proceeding, a duty arises under ICWA to give the Indian child's tribe notice of the pending proceedings and its right to intervene. [Citations.]" (*In re Shane G.* (2008) 166 Cal.App.4th 1532, 1538.) Notice to Indian tribes "is central to effectuating ICWA's purpose, enabling a tribe to determine whether the child involved in a dependency proceeding is an Indian child and, if so, whether to intervene in or exercise jurisdiction over the matter. [Citation.]" (*In re Breanna S.* (2017) 8 Cal.App.5th 636, 649.) "No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary." (25 U.S.C. § 1912(a).) And an Indian child, the child's parents, or the child's

tribe may petition to invalidate any actions taken in violation of Title 25, United States Code, section 1912. (25 U.S.C. § 1914.)

DCFS does not dispute that inquiry and notice requirements under ICWA and related California law were triggered by mother's statement on the ICWA-020 form that she may have Cherokee Nation ancestry. (See, e.g., *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1167 [the father's claim of Indian heritage on the ICWA-020 form triggered the social services agency's duty to engage in further inquiry]; *In re Desiree F.* (2003) 83 Cal.App.4th 460, 471 ["The Indian status of the child need not be certain to invoke the notice requirement"].) Nor does DCFS dispute it did not adequately comply in this matter with applicable inquiry and notice requirements.

Rather, the crux of the dispute is about the remedy. Mother argues the juvenile court's failure to provide ICWA notice constitutes jurisdictional error requiring reversal of its orders placing A.D. in foster care and setting the matter for a section 366.26 hearing. Some courts have agreed with this view. (See, e.g., *Nicole K. v. Superior Court* (2007) 146 Cal.App.4th 779, 781, 785-786; *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267.) Other courts, however, have concluded otherwise, and we believe the view of these other courts is the better-reasoned approach.

In *In re Brooke C.* (2005) 127 Cal.App.4th 377, for instance, Division Two of this court explained that orders entered by the juvenile court are *voidable* if proper ICWA notice has not been given, i.e., the Indian child or tribe may petition to vacate the orders. (*Id.* at p. 384; see also *Tina L. v. Superior Court* (2008) 163 Cal.App.4th 262, 268 [orders issued in violation of ICWA's 10-day notice rule are voidable, not void].) That rationale makes good logical sense, for as the court explained in *In re Antoinette S.*

(2002) 104 Cal.App.4th 1401, to hold otherwise would mean the "the juvenile court . . . lose[s] all authority over the dependent child in its care, requiring immediate return of the child to parents who have demonstrated at least temporary unfitness." (*Id.* at p. 1409-1411.) There is thus a "widespread practice" among reviewing courts, when confronted with unredressed ICWA error, to enter a limited reversal or a conditional affirmance of the juvenile court's orders with directions that the juvenile court comply with ICWA requirements. (*Tina L. v. Superior Court, supra,* at pp. 267-268; see also *In re Breanna S., supra,* 8 Cal.App.5th at p. 656; *In re Michael V.* (2016) 3 Cal.App.5th 225, 236.)

That would be our disposition here but for the fact that the juvenile court has already ordered DCFS to do what we would otherwise direct, namely, to conduct an appropriate inquiry and to provide notice to the pertinent Cherokee tribe(s). The juvenile court having done so, there is no effective relief we can now provide mother in this proceeding. The matter is therefore moot.[1] (See *In re N.S.* (2016) 245 Cal.App.4th 53, 58-60; *In re Jessica K.* (2000) 79 Cal.App.4th 1313, 1315 ["When no effective relief can be granted, an appeal is moot and will be dismissed"].)

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[1] If mother has a complaint about how DCFS complies with the juvenile court's ICWA inquiry and notice directions, or about the findings the court makes after such inquiry and notice, that complaint can be raised in this court at the appropriate time, i.e., after such inquiry, notice, and findings are complete.

DISPOSITION

The petition for extraordinary writ is dismissed as moot.

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BAKER, J.

We concur:

RUBIN, P. J.

MOOR, J.